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No. 188

In the

Supreme Court of the United States

OCTOBER TERM, 1957

GLENN HUBBARD HURST and EMPLOYERS CASUALTY COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, and BRIEF IN SUPPORT THEREOF

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Glenn Hubbard Hurst and Employers Casualty Company pray that a Writ of Certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit, entered January 24, 1958. Petition for rehearing was denied April 23, 1958.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals printed in Appendix A hereto is reported in *251 Fed. 2d 836.*

2.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958. Rehearing was denied on April 27, 1958. The jurisdiction of this Court is invoked under Article 28 U. S. C., Sec. 1254(1).

3.

QUESTIONS PRESENTED

I.

Whether a Court of Civil Appeals may, in rendering its judgment in a diversity case, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state?

II.

Whether a Circuit Court of Appeals may affirm the judgment of the trial Court rendering a summary judgment in a case where the evidence raised issues of fact for the jury without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

III.

Whether the United States Supreme Court will permit local law as determined by a Circuit Court of Appeals to control over the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States?

IV.

Whether the Court erred in deciding this case under the law of Texas when the accident occurred in New Mexico and the common law throughout America requires that the law of New Mexico be applied and in the alternative, if New Mexico has not decided the question or questions involved, then it becomes the duty of the Appellate Court to apply the weight of authority existing throughout all jurisdictions in determining these serious and important questions arising in the trial of about thirty per cent of all negligence cases now being tried.

V.

Whether the Court erred in holding that the trial court was correct in entering a summary judgment for the Appellee, Gulf Oil Corporation, in this cause.

VI.

Whether the Court erred in holding that Gulf's duties, under their contract and as a matter of law, did not require them to inspect the premises where the contractor's work was being performed to see if same was reasonably safe.

VII.

Whether the Court erred in failing to hold in this case, where an actual discovery of the danger of Hurst was made by the Gulf representative, Stach, that the doctrine of discovered peril did apply or, at least in the alternative, that Stach should have, after knowledge of the dangerous position of Hurst, given Hurst warning of his danger.

VIII.

Whether the Court erred in holding that the doctrine of inherently dangerous work does not extend to the employees of the independent contractor.

IX.

The Fifth Circuit held in the opinion that error was committed in the manner in which the trial court submitted the case to the jury. Hence, these questions are not raised by virtue of any complaint of the Fifth Circuit holding, but simply in order that this Honorable Court might review the entire case. Therefore, the additional questions are raised to the effect that the Court erred as follows:

(a) Petitioners allege that the Honorable Trial Court erred in charging the jury as follows, to-wit:

> "You are instructed that the duties imposed upon the parties hereto are such duties and such duties only as was required by knowledge or information of the parties on January 28, 1953, before the happening of accident. Such knowledge or information as has been acquired by or since the happening of accident concerning practices and safe practices shall not be considered by you for any purpose in determining issues which you are to be called upon to determine in this case."

Petitioner would show that he, then and there, after the charge of the Court had been given and prior to the jury's consideration of the same, excepted to the charge on the ground that in this case it is highly prejudicial since it might cause the jury to disregard the evidence of Mr. Hurst, and upon the further ground that any information that was present that could have been acquired by ordinary investigation, such as the reading of journals by manufacturers of oil rope, would have been available both before and after the accident, and that it omits a duty which the defendant Gulf stands charged by knowledge with.

(b) Petitioner would further respectfully show that the Trial Court committed error in charging the jury as follows, to-wit:

"In this case, such duty as rested upon Gulf Oil Corporation was not the duty to furnish the employees of Southeastern Drilling Company with a safe place in which to work, but, instead, to warn them of any dangers of which Gulf Oil Corporation knew or in the exercise of ordinary care should have known at the time when the work first commenced and of which such persons on its premises did not know or in the exercise of ordinary care should have known."

Plaintiff excepted to said instruction upon the ground that it destroyed the earlier portions of the charge that it is Gulf's duty to furnish this plaintiff with a safe place in which to work, and limits the condition of the place of work at the time when the work first commenced when it appears without dispute that when it first commenced, there was no danger to anyone, and amounts, in effect, to an instructed verdict against the plaintiff, to our great prejudice, and contrary to the law.

(c) Petitioners would further show that the Honorable Trial Court erred in charging the jury as follows, to-wit:

"If you find from a preponderance of the evidence that Gulf Oil Corporation did nothing with reference to the selection or direction of use of the wire line which broke, then your verdict will be for the defendant."

Petitioner would respectively shown, in this connection, that Plaintiff excepted to said charge upon the ground that since it is shown by the undisputed evidence that defendant did nothing affirmatively and the Court in said instruction does not distinguish between affirmative act or acts of omission, it being only acts of omission and a failure to act with which the Gulf is charged, and it amounts in effect to an instructed verdict against the plaintiff.

(d) Petitioners would further show that the Honorable Trial Court erred in charging the jury as follows, to-wit:

> "You are instructed that the contract as between Gulf Oil Corporation and Southeastern Drilling Company provides that the contractor shall swab the well at the request of Gulf and it, therefore, devolved upon the contractor to determine whether it should conduct the swabbing work as it did, or hire a company to perform the work for it."

Plaintiff would respectfully show, in this connection, that plaintiff excepted to said charge upon the grounds that it amounts to a judicial construction of the Court on the contract that is not controlling in this cause, and if controlling, would be a matter of fact determination by the jury rather than an instruction of law as to its legal effect.

(e) Petitioner would further show that the Honorable Trial Court erred in charging the jury immediately following the portion of the charge given in Paragraph 4 of plaintiff's Motion for New Trial, as follows, to-wit:

> "Therefore, if you find from a preponderance of the evidence that the accident on which this suit is based was proximately caused from the manner in which the well was swabbed and from the fact that the contractor itself elected to conduct the swabbing work instead of having it done by a swabbing company, then your verdict will be for the defendant, Gulf Oil Corporation."

Plaintiff would respectfully show, in this connection, that plaintiff excepted to said charge because it appears without dispute, under the evidence in this case, that the contractor did make the election. The complaint is here not that the contractor made the election but that the Gulf failed to prevent him from

making the election, and by the Court giving such instruction, it certainly should be like the remaining defense issued and require the jury to make a finding that such act on the part of the Gulf, if any, was the sole, proximate cause of the accident in question, because this issue is simply another defense issue, and while the other defense issues had the issue of sole proximate cause, this one does not, to the great prejudice of the plaintiff.

(f) Petitioner would further show that the Honorable Trial Court committed reversible error in refusing and failing to charge the jury with Plaintiff's Requested Instruction No. 4 as follows:

> "You are further instructed that if you find and believe from a preponderance of the evidence that the defendant, Gulf Oil Corporation, failed to provide proper overall supervision of the work in progress, and if you further find and believe from a preponderance of the evidence that such failure, if any, constitutes negligence, and if you further find and believe from a preponderance of the evidence that such failure was the proximate cause of plaintiff's damages and injuries, then you will find for the plaintiff, Glenn Hurst, and assess his damages at such sum as you may find him entitled to receive under the measure of damages hereinafter submitted to you by the Court."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Honorable Trial Court.

(g) Petitioner would further show that the Honorable Trial Court committed reversible error in failing and refusing to charge the jury with Plaintiff's Requested Instruction No. 5, to-wit:

> "You are further instructed that if you find and believe from a preponderance of the evidence

that the defendant, Gulf Oil Corporation, was guilty of negligence in swabbing or permitting the well to be swabbed by means of the draw works on the drilling rig instead of using a swabbing unit, and crew, and if you further find and believe from a preponderance of the evidence that such negligence was a proximate cause of the plaintiff's damages and injuries, then you will find for the plaintiff and assess his damages according to the measure of damages hereinafter submitted."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Trial Court.

(h) Petitioner would further show that the Honorable Trial Court committed reversible error in failing and refusing to charge the jury with Plaintiff's Requested Instruction No. 7, to-wit:

"You are instructed that if you find and believe from a preponderance of the evidence that the defendant, Gulf Oil Corporation, failed to exercise ordinary and reasonable care to prevent the place in which Glenn Hurst was working from becoming unsafe, and if you further find and believe from a preponderance of the evidence that the failure, if any, of the Gulf Oil Corporation to exercise ordinary and reasonable care to prevent the place in which Glenn Hurst was working from becoming unsafe constitutes negligence, and if you further find and believe from a preponderance of the evidence that such negligence was and is a proximate cause of the plaintiff's damages and injuries, then you will find for the plaintiff, Glenn Hurst, and assess his damages at such sum as you may determine under the measure of damages that will be hereinafter submitted to you."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Trial Court.

(i) Petitioner would further show that the Honorable Trial Court committed reversible error in refusing and failing to charge the jury with Plaintiff's Requested Instruction No. 10, to-wit:

> "You are further instructed that if you find and believe from a preponderance of the evidence that Glenn Stach, employee of Gulf Oil Corporation, failed to keep a proper lookout for the safety of the said Glenn Hurst, and if you further find and believe from a preponderance of the evidence that the failure, if any, of the said Glenn Stach to keep a proper lookout for the safety of the said Glenn Hurst constitutes negligence, and if you further find and believe from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries sustained by Glenn Hurst, then you will find for the plaintiff and assess his damages at such sum as you may find him entitled to receive under the measure of damages hereinafter submitted."

(j) Petitioner would further show that the Honorable Trial Court committed reversible error in refusing and failing to charge the jury with Plaintiff's Requested Instruction No. 11, to-wit:

> "You are further instructed that if you find and believe from a preponderance of the evidence that prior to the time that the swabbing line broke that Glenn Hurst was in a position of peril, and if you further find and believe from a preponderance of the evidence that Glenn Stach discovered the said Glenn Hurst's position of peril at a time when he could have, commensurate with his own safety and the safety of others by use of means at his command, avoided injury to Glenn Hurst, and if you further find and believe from a preponderance of the evidence that the said

Glenn Stach, realizing that Glenn Hurst probably would not or could not extricate himself from his position of peril, if any, and if you further find and believe from a preponderance of the evidence that under all of the above circumstances, if any, existing at said time that the said Glenn Stach failed to use the means, if any, at his command, to avoid injury to Glenn Hurst, and if you further find and believe from a preponderance of the evidence that the failure of the said Glenn Stach to use the means, if any, at his command to avoid injury to Glenn Hurst constitutes negligence, as that term has been defined, and if you further find and believe from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries suffered by the said Glenn Hurst, then you will find for the said Glenn Hurst and assess his damages at such sum as you may find him entitled to receive under the measure of damages to be submitted to you herein in this charge by the Court, and if you make such findings as hereinabove detailed with reference to negligence, if any, on the part of the said Glenn Stach after the discovery of the danger, if any, of the said Glenn Hurst, then you will find for the plaintiff, Glenn Hurst, even though you might believe or find from a preponderance of the evidence that Glenn Hurst failed to exercise ordinary and reasonable care for his own safety upon the occasion in question, or even though you might find and believe from a preponderance of the evidence that Glenn Hurst was guilty of contributory negligence, as that term has been defined in this charge, and even though you might find and believe that such contributory negligence, was a proximate cause of the plaintiff's damages and injuries. In other words, stated more plainly, contributory negligence, if any, upon the part of Glenn Hurst is not a defense and does not excuse the Gulf Oil

> Corporation from their negligence, if any, provided you find and believe that the applicable provisions of the law of discovered peril as charged in this paragraph exist."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Trial Court.

Further, it is quite evident, as stated by the Fifth Circuit, in the course of the opinion, that the trial court, in his charge, so charged the jury that it made it impossible for the jury to find for petitioners.

4.

STATEMENT

This is diversity of citizenship case filed for injury to a nineteen-year-old boy, Glenn Hubbard Hurst. Hurst was an invitee upon the premises of Gulf by virtue of being an employee of a contractor employed by Gulf Oil Corporation to do the swabbing operation. The Circuit Court of Appeals, in its opinion, describes the situation as follows:

> "The swabbing operation by the contractor had been going on for about eight days when the swabbing line broke. At the time of the break, the contractor's employee, Hurst, at the direction of his driller, was spooling the swabbing line. The unit was pulling on the swab which was about 9,400 feet in the hole. It had pulled it "approximately four or five hundred foot of stretch before the line broke." A part of the line struck Mr. Hurst and he was severely injured." (P. 837.)

The Court further continues on Page 838:

> "Negligence on the part of Gulf was charged: in failing to provide a safe place to work, in failing to

provide proper supervision of the work; in permitting the contractor to use a defective swabbing line, a drum which was too small, a sheave which was too small, a groove in the sheave which was too large, or to hang the sheave improperly, or otherwise negligently to install the apparatus."

The Court then continues:

"Glenn Stach, Gulf's drilling foreman, was its representative at this well. He knew that the swabbing line, which was new, had developed a kink *and that that had been corrected by splicing the line.* (The evidence however, showed that Stach was on the job most of the time, that he lived at the well site and further, that placing kinks in a line made it easier to break.) The line did not break in the splice or anywhere near it, and the splicing of the line had nothing to do with the accident. If Stach, as Gulf's representative, had been charged with any duty of supervision owed to the contractor's employees, he might have discovered that the drum was too small, the sheave too small, the groove in the sheave too large, and the apparatus improperly installed—all tending to cause unnecessary bending and fatigue of the 5/8 inch steel swabbing line and probably resulting in its finally breaking; or, if he had not been absent from the well at the time, he might have seen that Hurst, an eighteen year old employee of the contractor, was working in a dangerous place. Actually, neither Gulf, nor its representative Stach, undertook to supervise or control the method of work or the direction of the contractor's employees."

The Court further admitted as follows:

"At the conclusion of the evidence, the district court formally denied Gulf's motion for a directed verdict. It submitted the case to the jury under instructions, however, which, when followed by the jury, precluded a verdict for the plaintiff."

In the Motion for Rehearing filed by Petitioners, attention was called to the following propositions: First, that the Court should have decided the case under the law of New Mexico since the accident occurred there. Second, Petitioners pointed out in Point Two of the Motion for Rehearing that the Honorable Circuit Court erred in holding that the Gulf's drilling foreman failed to discover the peril of Hurst when the admitted and undisputed testimony of Gulf's representative, Stach, showed that he realized that the manner in which Hurst was working and the manner in which they were swabbing the well was exceedingly dangerous and *thereafter, he took no affirmative steps* to correct this situation or to *inform or warn Hurst, a youthful and inexperienced employee, of his danger.*

The attention of the Circuit Court was called to the fact that *it was the awkward position that Hurst had to get in in order to swab the well from the draw works that placed him in position to be hurt when the line broke. Hurst's injury, therefore, arose from the danger, not only of the line breaking, but also from the danger of Hurst having to be in a dangerous place where the line, after it did break, would hit him.* (Had Gulf not permitted the contractor to use this dangerous method of swabbing the well, this accident could not have occurred.)

It is therefore difficult for petitioners to understand how the facts set out in the Opinion of the Circuit Court to the effect that the line did not break in the splice or anywhere near it, and the further erroneous contention that splicing the line had nothing to do with the accident, had anything

to do with whether or not Stach discovered the peril of Hurst. The undisputed admissions of Stach showed that he *knew* that they were swabbing the well in a dangerous manner and that unless something was done to stop the manner in which the well was so being swabbed that Hurst might be injured. Under such circumstances, an employer of an independent contractor such as Gulf cannot *excuse Stach's failure to warn Hurst, by simply going off and leaving the dangerous situation.*

It is also quite evident that the work was inherently dangerous and that the doctrine of inherently dangerous work does, both in Texas and New Mexico, does inure to the benefit of the employee of the independent contractor. It is further evident that Gulf was aware that the work that had been delegated to the independent contractor was being done in a manner in which danger to Hurst was reasonably foreseeable and that it was incumbent upon Gulf, who occupied the position of owner or occupant. to do something about the situation by either *stopping* the work or by *warning* Hurst of his danger.

Stach admitted that he personally preferred to have a swab unit out there. (R., Pg. 352.) On Page 354 of the Record, he admitted that the position that Hurst had to be in with the guide bar in order to try to keep the oil rope on the spool would be a dangerous position and in his deposition, which was introduced in evidence, on Page 358, Stach answered as follows:

> "Q. And you realize that unless they use some other method of running that swabbing, that the men would

still have to go up in that dangerous position. Isn't that right?" And your answer was: "Unless they did something about—go about it so it would spool and be on there straight." then "Q. As far as the roughnecks themselves, they couldn't do anything about that. All they could do was to quit the job. Isn't that right? It wasn't up to the roughneck on the crew to extricate himself from this dangerous position, you understand that—And you said Yes." That's on Page 25 of your deposition. Then this question: "The roughneck wouldn't and couldn't take any action himself on that. Isn't that right?" And you said: "Well, you know when they started swabbing I didn't stay out there all the time and would leave and the pusher was and he was supposed to watch all safety cautions and all that while they were operating." "Q. Well, be that as it may, you did realize the roughnecks, whether the pusher was going to do it or not, you knew the roughneck himself *wouldn't or couldn't extricate himself* and get himself out of that dangerous position. *You realize that?*" And your answer was: "Yes." Isn't that right?

"A. *Yes, sir.*

"Q. *That is still true, isn't it?*

"A. *Yes, sir.*"

5.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The stautory provision involved in this case is the Rules of Decision Act, *28 U. S. C., Sec. 1652* which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

6.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The holdings complained of under the preceding statement are in direct conflict with the Supreme Court of Texas decisions on this subject hereinabove and hereinafter set out, including the additional Texas Supreme Court decision of *McKee General Contractor v. Patterson, 271 S. W. 2d 391*, which held that the duties of inspection to *make* and *keep* the premises reasonably safe was upon one occupying the status of Gulf in the case at bar.

Since the Court of Civil Appeals did not follow the law of Texas a typical situation is presented in which this Honorable Court has on a number of occasions granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Wichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. York, 320 U. S. 99.

See also *Rules of Decision Act, U. S. C., Section 1652.*

Certiorari was also apparently granted by this Honorable Court for this reason in *Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13, 1 L. Ed. 2d 77.*

The granting of the writ by this Honorable Court in the *Gibson* case was a matter of great significance to the legal world and to all litigants in personal injury suits of the character here involved.

Following the decision of this Honorable Court in the *Gibson* case, supra, the United States Court of Appeals for the Ninth Circuit said:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail." *Smith v. Ruck, 245 Fed. 2d 348.*

Citing with approval *Gibson v. Phillips Petroleum Co., 352 U. S. 874,* and *Reynolds v. Pegler, 223 Fed. 2d 429.*

Professor Leon Green in an illuminating article entitled: "Protection of Jury Trial in Diversity cases." June, 1957 Texas Law Review has this to say about the action of this Honorable Court in the *Gibson* case, supra:

> "The conclusion is that the Supreme Court was not willing to go along with the Texas Court in the deter-

mination of this issue as a matter of law by virtue of the local doctrine.

"No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th Amendment. The doctrine of the Texas Court is a transparent device to syphon off the powers of the jury by converting a question of fact into a question of law."

On page 770 Professor Green continues:

"Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F. E. L. A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right."

Citing *Dice v. Akron C. & Y. R.R., 342 U. S. 359*, and *Brown v. Western Ry. Co., 338 U. S. 294.*

Professor Green continues, page 770:

"How far the Supreme Court is prepared to go in protecting jury trials in common law cases in the federal courts against state court invasions is an interesting question, and one highly important to litigants in the area of personal injuries."

Professor Green of the law faculty of the University of Texas agrees with the action of this honorable court in the *Gibson* case with these remarks:

"In Texas, especially by virtue of its complex proximate cause and negligence per se doctrines, buttressed by intricate and numerous special issues, jury trial has been greatly impaired." Citing *Arnold v. Panhandle & Santa Fe Ry. Co., 77 Sup. Ct. 840.*

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

E. G. Ives v. Grand Trunk R. Co., 638 S. Ct. 1077, 319 U. S. 372;

Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608.

3. The questions here presented have great importance and far-reaching effect.

There are hundreds of thousands of industrial workers not only in Texas but elsewhere who will be denied protection and go uncompensated for their personal injuries if the rule announced by the Circuit Court is permitted to stand.

It is quite obvious that the Circuit Court could not explain away their prior decisions nor could they explain in any definite manner why the Texas cases relied upon were not in support of petitioners' theory.

Such a general statement of the law appears to be one supported only by the immediate whim and caprice of the Circuit Court and should not be permitted to stand in a federal court of justice in defiance of petitioners' constitutional right to trial by jury as well as the rights of those many thousands of seriously injured workmen who will likewise be denied their day in court.

It has long been the settled law of Texas and throughout America that it is the duty of a general contractor

or occupant of land or owner and invitor, such as Gulf, to exercise ordinary and reasonable care to furnish the employee of the independent contractor coming upon the premises to work, a reasonably safe place in which to work. It is further the established law of Texas that this duty to furnish a safe place carries with it, in addition, a duty to warn an invitee such as Hurst of any danger of which the invitee is unaware and of which the invitor, such as Gulf *has actual knowledge* or *could*, in the exercise of ordinary care, have discovered and had actual knowledge of.

It is the plain holding of our Texas Courts that the *invitor, occupant* of land or *general contractor*, or owner, such as Gulf, *all of whom in Texas occupy the same relationship with respect to the duties owed an invitee, must make an inspection of the premises to determine whether or not the place that the invitee is working is reasonably safe* and further, thereafter, as the work progresses, *he must make further inspections to keep the place where the work is being performed reasonably safe.* The Fifth Circuit did, heretofore in prior opinions, adhere to this rule, but now, for the first time, the Fifth Circuit has repudiated all of these holdings, not only of their own, but of the Supreme Court of Texas, as well as the decisions of this Court, and held that an actual control of the work in question is necessary before the one such as Gulf can be liable. They have further mistakenly held that the doctrine of inherently dangerous work does not inure to the benefit of the employee.

The above holdings are directly contrary to the following decisions:

Gulf Oil Corporation v. Wright, 236 Fed. 2d 46;

Sun Oil Company v. Pierce, 224 Fed. 2d 580;

United Production Corp. v. Chesser, 107 Fed. 2d 850;

Amacker v. Skelly Oil Company, 132 Fed. 2d 431;

Roosth & Genecov Production Co. v. White, 152 Tex. 619, 262 S. W. 2d 99;

Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A. L. R. 2d 853;

Nealy v. The Magnolia Petroleum Co., 121 S. W. 2d 425;

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Wright v. Tudor City 12th Unit, Inc., et al., 12 N. E. 2d 307;

Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13; 1 L. Ed. (Mo.) 77.

In addition thereto, it is well settled that an action brought in Texas for an injury occurring in New Mexico must be determined by the law of New Mexico. *Nealy v. Magnolia Petroleum Co., 121 S. W. 2d 425.* To hold as has the 5th Circuit that such is not true upon the theory that same was not originally urged is to deny to Petitioners "due process" and equal protection of the law as provided by the Constitution of the United States.

Nothing that has been stipulated with reference to the issue *of special employee only can change the obligation of the Fifth Circuit to let the law of New Mexico control this*

situation. Since New Mexico has not passed upon most of these questions directly, then it becomes the duty of This Honorable Court in the exercise of its supervisory powers to apply the weight of authority as it exists under the common law throughout America in answering the important and substantial questions in this law suit.

It will be hereinafter demonstrated by a brief in support of of this Petition, that Gulf, under the contract between Gulf and the employer of Hurst, reserved to themselves the right to determine whether the work in question was being performed with the *maximum of safety,* including safe methods of doing the work contracted.

The decision of the Fifth Circuit conflicts with the decision rendered by the same members of the same court in *Thacker v. J. C. Penney Co.,* now pending before this court styled *J. C. Penney Co., Petitioner v. Jada Thacker, et al., Respondents,* on Petition for Certiorari. Judge Wisdom wrote the opinion with Judge Hutcheson specially concurring, *but only because it became the duty* (according to Justice Hutcheson, one which he claimed differing from the majority, didn't otherwise exist) of the storeowner to do something *about it after discovering the danger of Jada Thacker.*

In that case, as here, the same attorney represented the defendant in both cases. One of the same attorneys for Petitioner represented Thacker.

These same contentions were presented to the same Court in the *Thacker* case as well as in the *Hurst* case.

It is difficult to understand how on this important question of knowledge of danger, the same court rendered conflicting opinions.

At least, in the *Thacker* case, they unanimously regarded it not only of paramount but also of controlling importance.

In the case at bar, they refused to consider or even to discuss with a correct statement of the evidence, Stach's knowledge of the danger to Hurst.

It will be noted that the claim is made by the Fifth Circuit on the Motion For Rehearing that they were justified in deciding the case under the law of Texas because of a certain stipulation that was entered into. A reading of the stipulation will show that it went no further than to cover an agreement with reference to the issue of special employee and that the law of Texas and New Mexico was the same. It was very difficult for Petitioner to urge the law of New Mexico upon the original hearing because, as pointed out in this Brief, New Mexico has not directly passed upon any questions here involved except the issue of special employee. That, however, constitutes no grounds for the Circuit Court picking out the law of Texas as they construe it rather than the common law throughout America as a basis for their decision.

A most recent case of *Johnson v. Nicholson, 324 Pacific 2d 307*, by the District Court of Appeals for the Second District of California, cited April 16, 1958, is squarely in point on many of the questions involved in this case. We would like to urge, as a reason for granting the Writ, in

addition to the above reasons, these quotations from Page 314:

> "Liability for carelessly handling dangerous instrumentalities arises from failure to use due care, and such failure arises when the circumstances show that the actor had reason to know that his act was likely to produce injury to any person in the lawful pursuit of his own business and exercising reasonable care. When human life is at stake the rule of due care and diligence requires *that without* regard to difficulties or expense every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others. One who causes the use of a dangerous instrument in a negligent manner, or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not at fault."

The holding of the 5th Circuit is in direct conflict with *Halecki v. United New York and New Jersey S. H. P. Ass'n, 251 Fed. 2d 708.* In this case Judge Hand, speaking for the 2nd Circuit, said:

> *"The deceased was certainly an 'invited person' or 'business guest,' and the ship owner was liable, not only for the negligence of the master, but, although the work was let out to a sub-contractor, also for any lack of 'reasonable care to ascertain the method and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities'."*

The above holding is squarely in support of Petitioners' position here as well as the position of the Petitioner in *Sword v. Gulf*, now pending before this Honorable Court.

WHEREFORE, your petitioners respectfully pray this Honorable Court to grant the Petition for Writ of Certiorari to the end that on review, the Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

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APPENDIX A

GLENN HUBBARD HURST AND EMPLOYERS CASUALTY COMPANY, *Intervener*,

Appellants,

versus

GULF OIL CORPORATION,

Appellee.

United States Court of Appeals

Fifth Circuit.

Jan. 24, 1958.

No. 16496

Action for injuries sustained by oil well drilling contractor's employee. From a judgment of United States District Court for the Western District of Texas, R. E. Thomason, J., in favor of defendant, the plaintiff and intervener appealed. The Court of Appeals, Rives, Circuit Judge, held inter alia that in action for injuries to oil well drilling contractor's employee when a swabbing line broke, evidence including showing that representative of oil and gas lease which had a contract with drilling contractor which provided that in performance of work contractor was independent contractor with authority to control and direct performance of details was not charged with duty of supervision owed to contractor's employee was insufficient for jury on issue of negligence on part of owner of oil and gas

lease in failing to provide safe place to work, in failing to provide proper supervision of work, and in permitting contractor to use defective apparatus, or negligently to install it.

Affirmed.

1. Master and Servant Key 318(2)

In absence of any actual control of operation, or of any reserved right of control more than that deemed necessary to secure satisfactory completion of the work, an employer of independent contractor owes no duty to contractor's employees to inspect or supervise installation or operation of machinery furnished by contractor.

2. Master and Servant Key 319

Under Texas law, rule that an employer of an independent contractor is liable to third persons for negligence of contractor in performance of work inherently dangerous does not extend to employees of the independent contractor.

3. Master and Servant Key 332(3)

In action for injuries to oil well drilling contractor's employee when a swabbing line broke, evidence including showing that representative of oil and gas lease which had a contract with drilling contractor which provided that in performance of work contractor was independent contractor with authority to control and direct performance of details was not charged with duty of supervision owed to contractor's employees was insufficient for jury on issue

of negligence on part of owner of oil and gas lease in failing to provide safe place to work, in failing to provide proper supervision of work, and in permitting contractor to use defective apparatus or negligently to install it.

John J. Watts, Odessa, Tex., for appellants.

William L. Kerr, Max N. Osborn, Midland, Tex., for Gulf Oil Corp. Turpin, Kerr & Smith, Midland, Tex., of counsel.

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge.

This case and the Sword case[1] were heard successively (though in reverse order) in the district court and in this Court; and, under the facts and circumstances of the particular case, present the same question for decision, viz.: whether a jury could properly hold the employer of an independent contractor liable for injury to an employee of that contractor.

In this case also, Gulf was the owner of an oil and gas lease covering "flat, bald prairie." It contracted with Southeastern Drilling Company for the drilling and completion of a well for oil and gas. The contract was on the same printed form as that referred to in the Sword case, supra, and some pertinent provisions of which were quoted in footnote 1 to the opinion in that case. A further provision may

[1] Sword v. Gulf Oil Corporation, 251 F.2d 829.

be noted in the margin.[2] The contract further provided that the contractor was to furnish the "swabbing equipment, including swabbing unit, swabbing line and swab."

The well had been drilled to its required depth of 9,600 feet, and was being swabbed in an effort to bring about the production of gas or oil. The contractor first employed a separate swabbing contractor to do the swabbing work, but took over the work itself when it became evident that it might have to continue for an indefinite period of time. The swabbing operation by the contractor had been going on for about eight days when the swabbing line broke. At the time of the break, the contractor's employee, Hurst, at the direction of his driller, was spooling the swabbing line. The unit was pulling on the swab which was about 9,400 feet in the hole. It had pulled it "approximately four or five hundred foot of stretch before the line broke." A part of the line struck Mr. Hurst and he was severly injured.

Negligence on the part of Gulf was charged: in failing to provide a safe place to work, in failing to provide proper supervision of the work; in permitting the contractor to use a defective swabbing line, a drum which was too small, a sheave which was too small, a groove in the sheave which

[2] "13. Completion Test:
"Contractor agrees, when making a completion test of this well, to run tubing and to swab the well at the request of Gulf for a length of time sufficient to make certain that the hole is free of drill mud or drilling water or both. Regardless of depth Contractor shall continue the work of swabbing or other work or hold Contractor's rig while pumping or flowing tests are being made, for such length of time as Gulf may deem it necessary for the completion of the well in accordance with its wishes; or, if requested by Gulf to do so, Contractor shall plug and abandon the well. The time required for the performance of all work referred to in this paragraph shall be paid for by Gulf at the applicable day rate set out below."

was too large, or to hang the sheave improperly, or otherwise negligently to install the apparatus. No Gulf equipment was involved. No Gulf representative had attempted to direct the performance of the work. No Gulf employee was present when Hurst was injured.

Glenn Stach, Gulf's drilling foreman, was its representative at this well. He knew that the swabbing line, which was new, had developed a kink and that that had been corrected by splicing the line. The line did not break in the splice or anywhere near it, and the splicing of the line had nothing to do with the accident. If Stach, as Gulf's representative, had been charged with any duty of supervision owed to the contractor's employees, he might have discovered that the drum was too small, the sheave too small, the groove in the sheave too large, and the apparatus improperly installed,—all tending to cause unnecessary bending and fatigue of the 5/8 inch steel swabbing line and probably resulting in its finally breaking; or, if he had not been absent from the well at the time, he might have seen that Hurst, an eighteen year old employee of the contractor, was working in a dangerous place. Actually, neither Gulf, nor its representative Stach, undertook to supervise or control the method of work or the direction of the contractor's employees.

At the conclusion of the evidence, the district court formally denied Gulf's motion for a directed verdict. It submitted the case to the jury under instructions, however, which when followed by the jury, precluded a verdict for

the plaintiff. For example, the court charged the jury, "If you find from a preponderance of the evidence that Gulf Oil Corporation did nothing with reference to the selection or direction of use of the wire line which broke, then your verdict will be for the defendant." The undisputed evidence was that Gulf had not done anything with reference to the selection or direction of use of that wire line. There were other instructions which made a verdict for the plaintiffs practically impossible. After the jury had returned its verdict for the defendant, the district court entered judgment not only on that verdict, but also forthrightly on Gulf's motion for judgment based upon the reasons and grounds which had been stated in its motion for a direct verdict.[3]

[1, 2] It is not necessary to repeat what has just been said in the Sword case footnote 1, supra, further than to restate two of the rulings reached in that opinion: (1) In the absence of any actual control of the operation, or of any reserved right of control more than that deemed necessary to secure the satisfactory completion of the work, an employer of an independent contractor owes no duty to the contractor's employees to inspect or to supervise the installation or operation of the machinery furnished by the contractor. (2) In Texas, the rule that an employer of an independent contractor is liable to third persons for negli-

[3] As in the Sword case, the appellants here do not complain of the court's failure to reserve its decision on the motion for directed verdict as suggested in Rule 50(b), Federal Rules of Civil Procedure, 28 U.S. C.A. See Slocum v. New York Life Ins. Co., 1913, 228 U.S. 364, 381, 33 S.Ct. 523, 57 L.Ed. 879, commented on in 2 Moore's Federal Practice, 2nd ed., Paragraph 2.04, pp. 326, 327, and 5 Id., Paragraphs 50.01(8), 50.07, and 50.10.

gence of the contractor in the performance of work inherently dangerous does not extend to employees of the independent contractor.

[3] Under the evidence in this case, the jury could not properly hold the employer of the independent contractor liable for injury to the employee of that contractor. The judgment is therefore

Affirmed.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 16496

GLENN HUBBARD HURST AND EMPLOYERS CASUALTY COMPANY, *Intervener*,

Appellants,

versus

GULF OIL CORPORATION,

Appellee.

PETITION FOR RECALL OF MANDATE

To Said Honorable Court:

Glen Hubbard Hurst and Employers Casualty Company, respectfully present this, their application for the recall of the Mandate of the United States Court of Appeals for the Fifth Circuit heretofore issued to the Clerk of the United States District Court in and for the Western District of Texas, Pecos Division, on judgment rendered in the above case on the 24th day of January, 1958, and Order denying Petition for Rehearing entered on the 23rd day of April, 1958, under the provisions of Section 2101 of Title 28 of the United States Code, to enable said Petitioner to apply for

and obtain a Writ of Certiorari from the Supreme Court of the United States.

The grounds upon which said Petition for Certiorari will be based are as follows:

I.

The Court erred in deciding this case under the law of Texas when the accident occurred in New Mexico and the Statutes of Texas require that the law of New Mexico controls.

II.

The Court erred in holding that the trial court was correct in entering a summary judgment for the Appellee, Gulf Oil Corporation, in this cause.

III.

The Court erred in holding that Gulf's duties, under their contract and as a matter of law, did not require them to inspect the premises where the contractor's work was being performed to see if same was reasonably safe.

IV.

The Court erred in failing to hold in this case, where an actual discovery of the danger of Hurst was made by the Gulf representative, Stach, that the doctrine of discovered peril did not apply or, at least in the alternative, that Stach should have, after knowledge of the dangerous position of Hurst, given Hurst warning of his danger.

V.

The Court erred in holding that the doctrine of inherently dangerous work does not extend to the employees of the independent contractor.

The reasons why a recall is deemed necessary are as follows:

1. It is the intention of the Petitioner herein to make application for Writ of Certiorari.

2. The final judgment of this Court is subject to review by the Supreme Court of the United States on Writ of Certiorari.

3. Time is requested for the preparation and filing of the Petition for Certiorari and brief in support thereof, and for the period in which the case is before the Supreme Court of the United States.

WHEREFORE, Petitioners pray that the mandate be recalled and that a stay be granted for such time, as, in the opinion of the Court, may be necessary to prepare and file the Petition for Certiorari and Brief in support thereof, and for the time in which the case will be before the Supreme Court of the United States, and that the Court prescribe the security, if any, required of Petitioners for such stay of the mandate, execution, and judgment of this Court.

/s/ JOHN J. WATTS

John J. Watts,
Attorney for Petitioners

JOHN J. WATTS
Post Office Box 1031,
Odessa, Texas.
Of Counsel

APPENDIX C

ORDER RECALLING AND STAYING JUDGMENT ISSUED AS MANDATE FILED:—

June 26, 1958.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 16496

GLENN HUBBARD HURST AND EMPLOYERS CASUALTY COMPANY, *Intervenor*,

Appellants,

v.

GULF OIL CORPORATIOK,

Appellee.

ON CONSIDERATION OF THE PETITION of Appellants for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United State, IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court, at Pecos, Texas, on May 12, 1958, be recalled and stayed for a period of thirty days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of

this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

/s/ RICHARD T. RIVES
United States Circuit Judge

June 26, 1958.

APPENDIX D

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16496

GLENN HUBBARD HURST and EMPLOYERS CASUALTY COMPANY, *Intervener*,

Appellants,

v.

GULF OIL COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(April 23, 1958.)

ON PETITION FOR REHEARING.

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

PER CURIAM: The first ground urged in support of the petition for rehearing is that the Court "erred in *deciding this case under the laws of Texas* in that this

accident occurred in New Mexico and even though the suit was tried in Texas *the law of New Mexico would control same.*" (Emphasis, the petitioner's.) The only reference we have found to the law of New Mexico upon the trial was contained in the oral statement of a stipulation, as quoted in the margin.[1] Appellee stated its construction of that stipulation in its brief in this Court on October 24, 1957: "The accident had occurred in New Mexico but the case was tried under stipulation that Texas law controlled. (R. 241-42)." Appellant filed a reply brief on November 4, 1957 and a supplemental brief on November 23, 1957, but in neither do we find any dissent from appellee's construction of the stipulation, or any argument based on the law of New Mexico. Unless our recollection of the oral argu-

[1] "Mr. Kerr [Counsel for Defendant]:

"May it be stipulated that at all times pertinent to the date or dates involved in this case that Gulf Oil Corporation was the employer of more than three employees, and as such, was covered under the Workmen's Compensation Act of both Texas and New Mexico. That the New Mexico Compensation Act, insofar as this case is concerned, may be regarded as similar to the Texas Workmen's Compensation Act, and that by the terms of each or both such acts, the rights of an employee of any employer, loaned, regular or special, is to be measured by the Compensation Act, and no employee covered under the Compensation Act as a loaned, regular, or special employee may file suit against the employer, such as Gulf Oil Corporation, who carried such coverage. That may be stipulated, may it not?

"Mr. Watts [Counsel for Plaintiff]:

"What I wanted to agree with you was that the law of New Mexico is the same as the law of Texas and let it go at that.

"Mr. Kerr:

"May I say this, the reason I made it in that way, I don't know anything about New Mexico law. I asked Mr. Neal yesterday about—talking about this loaned, regular, and special, and he said they never had any cases in New Mexico that covered it. We have had a lot of them in Texas. That is the reason I asked for the stipulation that it covers loaned, regular, or special. Frankly, I don't think this man was an employee of the Gulf Oil Corporation, but in the event it should be held that we were exercising supervision and control, or had that right, we offered that as an additional defense that we plead.

"The Court:

"All right."

Record pages 241 and 242.

ment is faulty, no question as to the stipulation was then raised and there was no insistence on the law of New Mexico This ground of the petition for rehearing comes too late.

We have considered the other grounds and find them without merit. The petition for rehearing is therefore

DENIED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana

(SEAL)